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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 SAN DIEGO NAVY BROADWAY
12 COMPLEX COALITION,

13 Plaintiff,

14 vs.

15 U.S. DEPARTMENT OF DEFENSE; et al.,

16 Defendants.

CASE NO. 07cv0038 JM(WMc)

**ORDER GRANTING MOTION
TO DISMISS; GRANTING
LEAVE TO AMEND**

17 Defendant Manchester Pacific Gateway LLC (“MPG”) moves to dismiss the complaint for
18 failure to state a claim under Fed.R.Civ.P. 12(b)(6). Plaintiff San Diego Navy Broadway Complex
19 Coalition (“NBCC”) opposes the motion. The other defendants have not responded to the motion nor
20 filed a statement of non-opposition. For the reasons set forth below, the motion to dismiss is granted
21 with 20 days leave to amend from the date of entry of this order.

22 **BACKGROUND**

23 On January 4, 2007, NBCC commenced this action against the United States Department of
24 Defense, the Department of the Navy, Naval Facilities Engineering Command, Naval Facilities
25 Engineering Command Southwest, several individual federal officers in their official capacities
26 (collectively “Federal Defendants”), and MPG. Plaintiff seeks declaratory and injunctive relief for
27 alleged violations of the National Environmental Policy Act (“NEPA”) and the Administrative
28 Procedures Act (“APA”).

1 The project at issue involves a development agreement between the City of San Diego and the
 2 Navy for the Navy Broadway Complex located on four city blocks along the waterfront in downtown
 3 San Diego. Plaintiff challenges the November 22, 2006 finding that the that the project will not have
 4 a significant impact on the environment ("FONSI"). The determination was based on an
 5 environmental impact statement prepared in 1990, a record of decision prepared in 1992, and an
 6 environmental assessment ("EA") prepared in 2006. (Compl. ¶5). Also on November 22, 2006, MPG
 7 and the Department of the Navy entered into a 99 year ground lease for the development of the
 8 project.

9 The Complaint alleges that Defendants (1) failed to prepare an Environmental Impact
 10 Statement ("EIS"); (2) failed to prepare a supplemental EIS ("SEIS"); and (3) failed to allow public
 11 participation before making the FONSI. (Compl. ¶¶12-26). Plaintiff alleges that the EA was prepared
 12 behind closed doors, without the public's knowledge, and without any opportunity for public comment
 13 on the accuracy and adequacy of the EA. (Compl. ¶¶19, 24). The EA concluded that there was no
 14 need to update the 1990 EIS. Plaintiff challenges this finding and alleges that a modern-day EIS or
 15 a SEIS is required to adequately assess the environmental impact of the project. (Compl. ¶¶15, 20,
 16 24).

17 Plaintiff seeks a declaration from the court that Defendants failed to comply with NEPA and
 18 the APA and that Defendants must prepare an EIS or an SEIS. Furthermore, Plaintiff seeks an
 19 injunction to prohibit Defendants, or anyone in privity with them, from taking any action on any
 20 aspect of the project.

21 MPG argues that it is not a proper party to this action because it is a private development
 22 company, not a federal agency subject to NEPA. Plaintiff opposes the motion.

23 DISCUSSION

24 Legal Standards

25 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in "extraordinary" cases.
 26 United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Courts should grant 12(b)(6) relief
 27 only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a
 28 cognizable legal theory. See Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

Courts should not dismiss a complaint "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle [the party] to relief." Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)), cert. denied, 496 U.S. 906 (1990). The defect must appear on the face of the complaint itself. Thus, courts may not consider extraneous material in testing its legal adequacy. See Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991). The courts may, however, consider material properly submitted as part of the complaint. See Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

Finally, courts must construe the complaint in the light most favorable to the plaintiff. See Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. See Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. See In Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

The Motion

MPG asserts that only the Federal Defendants are proper parties under NEPA. NEPA imposes duties and obligations on "all agencies of the Federal Government. . . ." 42 U.S.C. §4332. The twofold purpose of NEPA is "to inject environmental considerations into the federal agency's decisionmaking process" and "to inform the public that the [federal] agency has considered environmental concerns in its decisionmaking process." Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 143 (1981). As noted in Macht v. Skinner, 916 F.2d 13, 18 (D.C. Cir. 1990), "NEPA requires federal agencies - not states or private parties - to consider the environmental impacts of their proposed actions (emphasis in original)."

Here, the three NEPA claims alleged by Plaintiff can only be asserted against the Federal Defendants. The three claims specifically allege that Federal Defendants violated NEPA by failing to prepare an EIS, failing to prepare an SEIS, and failing to allow adequate public comment before making the FONSI. (Compl. ¶¶12-26). As the express statutory scheme imposes these environmental

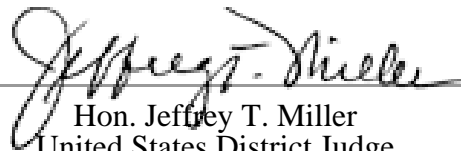
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1 obligations only on federal agencies, the complaint as currently pled fails to state a claim against
2 MPG.¹

3 In sum, the court grants the motion to dismiss for failure to state a claim against MPG. As
4 leave to amend is to be freely granted under Fed.R.Civ.P. 15(a), the court grants Plaintiff's oral
5 request for leave to amend the complaint. The amended complaint shall be filed within 20 days of
6 entry of this order.

7 **IT IS SO ORDERED.**

8 DATED: May 7, 2007

9 
10 Hon. Jeffrey T. Miller
United States District Judge

11 cc: All Parties
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27 ¹ Plaintiff opposes the motion to dismiss largely on the ground that MPG is a proper party under
28 Fed.R.Civ.P. 19. The court declines to consider Plaintiff's opposition to the Rule 12(b)(6) motion as a motion
to join a necessary or indispensable party under Rule 19.